No. 9020.

In the United States Circuit Court of Appeals

For the Ninth Circuit.

L. J. KELLY, F. H. DOLAN, BEN BAXTER, S. JAMES TUFFREE, ED. KELLY, F. A. YUNGBLUTH, MINNIE PALMER, formerly known as MINNIE BAXTER, M. DEL GIORGIO, JENNIE POMEROY, J. W. TRUXAW, J. J. DWYER, M. E. DAY, ERNEST F. GANAHL, FRANK BAUM and JOSEPHINE BAUM, husband and wife,

Appellants,

vs.

ANAHEIM FIRST NATIONAL BANK, a national banking corporation,

Appellee.

APPELLANTS' OPENING BRIEF.

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Appellants,

vs.

ANAHEIM FIRST NATIONAL BANK, a national banking corporation,

Appellee.

APPELLANTS' OPENING BRIEF.

(Note: Herein for the sake of brevity, we shall refer to L. J. Kelly, F. H. Dolan, Ben Baxter, S. James Tuffree, Ed Kelly, F. A. Yungbluth, Minnie Palmer, formerly known as Minnie Baxter, M. Del Giorgio, Jennie Pomeroy, J. W. Truxaw and J. J. Dwyer, as the appellants; to the Anaheim First National Bank, a national banking association, as "The Bank;" and to J. V. Hogan, Receiver of the Anaheim First National Bank, a national banking association, as "The Receiver.")

(It is to be noted that where "R." is used it refers to the original Transcript of Record, and where "S. R." is used it refers to the Supplemental Transcript of the Record.)

JURISDICTIONAL STATEMENT.

This action was instituted by the appellants as plaintiffs against the appellee as defendant in the Superior Court of the State of California, in and for the County of Orange [R. 4] and was filed in said Superior Court on the 11th day of January, 1936 [R. 35]. Thereafter on the 15th day of February, 1936 [R. 40] the receiver herein filed petition for removal of cause to the United States District Court, Southern District of California, Central Division [R. 36] under Judicial Code, section 24, sub-section 16 (U. S. C. A., Title 28, Section 41, Sub-section 16) and Judicial Code, sections 28 and 29 (U. S. C. A., Title 28, Sections 71-72) [R. 38]. Notice of removal [R. 41] having been given, and bond filed [R. 42], the Court made the order of removal to the District Court of the United States, Southern District of California, Central Division [R. 45], and a motion to remand [R. 47] was made and denied [R. 47]. This action was brought by the appellants as plaintiffs against the Bank to recover the following amounts, to-wit:

(a) For appellant, L. J. Kelly, the sum of $4,900.00 [R. 33];

(b) For appellant, F. H. Dolan, the sum of $32,500.00 [R. 33];

(c) For appellant, Ben Baxter, the sum of $1,750.00 [R. 33];

(d) For appellant, S. James Tuffree, the sum of $3,500.00 [R. 33];

(e) For appellant, Ed Kelly, the sum of $9,000.00 [R. 33];

(f) For appellant, F. A. Yungbluth, the sum of $1,750.00 [R. 33];

(g) For appellant, Minnie Palmer, formerly known as Minnie Baxter, the sum of $3,850.00 [R. 33];

(h) For appellant, M. Del Giorgio, the sum of $875.00 [R. 34];

(i) For appellant, Jennie Pomeroy, the sum of $3,-500.00 [R. 34];

(j) For appellant, J. W. Truxaw, the sum of $1,-750.00 [R. 34];

(k) For appellant, J. J. Dwyer, the sum of $1,750.00 [R. 34];

(l) For plaintiff, M. E. Day, the sum of $875.00 [R. 34];

(m) For plaintiff Ernest F. Ganahl, the sum of $1,-750.00 [R. 34];

(n) For plaintiffs, Frank Baum and Josephine Baum, the sum of $5,250.00 [R. 34];

(o) For interest on each and all of the aforesaid amounts at the rate of 7% per annum from January 15, 1934; and for the redelivery and cancellation of all notes and trust deed received from the plaintiffs alleged to have been given to the bank and that the lien created by any such instruments on any of the property enumerated [R. 22-24] be cancelled and that the bank cause a satisfaction of any liens theretofore given by plaintiffs upon the matter therein litigated to be recorded [R. 34] and for plaintiffs' costs of suit and for such other relief as to the Court might seem meet and proper [R. 34].

The answer of defendant, Anaheim First National Bank, a national banking corporation, by and through J. V. Hogan, Receiver of said Anaheim First National Bank, a

national banking corporation, was filed [R. 50]. The answer admits that the depreciation in the bond account pled in the complaint existed on or about June 18, 1936; admits that the claims made in the complaint were duly presented to the Receiver according to law and admits that the claims were not paid. The only issue taken is a denial that the plaintiffs and appellants entered into a lawful agreement with the bank whereby they, and each of them, agreed to purchase from said bank the depreciation then existing in said bond account. Thereafter, dismissal of Frank Baum and Josephine Baum was filed on June 5, 1937 [R. 77] and order *re* withdrawal of Frank Baum and Josephine Baum as parties plaintiff was entered and recorded June 5, 1937 [R. 76]. On August 13, 1938, a stipulation was filed as to a severance of Ernest F. Ganahl from said action and that his appeal might be dismissed as to him only [R. 159] and order granting severance of Ernest F. Ganahl to appeal was signed by William P. James, United States District Judge, and entered on August 13, 1938 [R. 160]. Since a time prior to the commencement of this action, the plaintiff F. K. Day has been dead [R. 84] and M. E. Day succeeded to all his right, title and interest herein sued upon, and the said plaintiff, M. E. Day, is now the owner and holder thereof [R. 4-5]. Thereafter, the cause proceeded to trial in the District Court of the United States, Southern District of California, Central Division, before the Honorable William P. James, judge presiding, sitting without a jury, a jury trial having been duly waived by the respective parties to said action, on July 20 and 21, 1937 [R. 92]. Findings of fact and conclusions of law were signed by the said William P. James, judge of said District Court on February 28, 1938, filed March 2, 1938 [R. 91], and judgment in favor of the appellee and against the appellants was

entered and recorded March 2, 1938 [R. 93]. Motion for new trial was duly noticed for hearing on the 25th day of April, 1938 [R. 99-100] and the Court on May 13, 1938, caused his minute order to be entered denying plaintiffs' motion for new trial [R. 101]. This appeal is prosecuted from the judgment of the District Court of the United States under the authority of U. S. C., Title 28, section 225, sub-section (a) (Judicial Code—Amended). Pursuant to that certain Order of this Honorable Court made on the 20th day of April, 1939, and pursuant to a hearing in this Honorable Court on May 10, 1939, on the question of the applicability of the new rules of civil procedure for the District Court of the United States to the above cause, it was ordered by this Honorable Court on the 10th day of May, 1939, that the appellants should within fifteen days from that date serve and file with the clerk of the trial court, a designation of the necessary parts of the record and exhibits they desired to supplement the Transcript of Record on file in this Court in the above cause, and that the appellee within five days thereafter serve and file a designation of such additional parts with the clerk of the trial court and that the clerk of the trial court should thereafter certify such documents as a Supplemental Transcript of Record to this Court and that within five days after the filing of said Supplemental Transcript of Record and Exhibits the parties might file a designation of the parts of such record and exhibits deemed necessary for the hearing of this cause in this Court. Pursuant to said Order the appellants herein did, on the 1st day of June, 1939, file designation for Supplemental Transcript of Record designating all of the Reporter's Transcript of Testimony and Proceedings on Trial together with the Reporter's Transcript of copies of Plaintiffs' Exhibits 1, 2, 3, 4 and Defendant's Exhibits

A, B, C, D, E, F, G, H, I, J and K (all inclusive) [S. R. 199] and the appellee did consent to the printing of the whole of Reporter's Transcript of Testimony and Proceedings on Trial and of Plaintiffs' and Defendant's Exhibits to be used as Supplemental Transcript of Record on June 1st, 1939, which said consent was duly filed in this Honorable Court on June 2nd, 1939 [S. R. 200]. The above cause, although filed before September 1st, 1938 (the effective date upon which the new rules of civil procedure became effective) was still pending on and after that date, and therefore, the New Federal Rules of Civil Procedure are applicable to the above cause. (Rule 86, Federal Rules of Civil Procedure.)

STATEMENT.

On or about the 18th day of June, 1931, the bank was a national banking association organized and existing under the statutes of the United States known as the National Banking Act, which at all times had its place of business at Anaheim, Orange County, State of California [R. 5]. That on or about the 18th day of June, 1931, the regular monthly meeting of the Board of Directors of the bank was held and it was then moved by Ben Baxter (one of the appellants herein), seconded by F. H. Dolan (another one of the appellants herein) and carried that a committee be selected to collect $175.00 per share from stockholders to be used to purchase depreciation in bond account [S. R. 16-17]. On or about the 17th day of July, 1931, the regular meeting of the Board of Directors of the bank was held [S. R. 19-20] and it was resolved that $115,650, which had been paid in by stockholders at the rate of $175.00 per share for the purchase of bond depreciation, together with certain other proceeds held on the books of the bank on reserve account, be applied to take up five notes of

$6,000.00 each, as formerly placed in the bank's assets by certain stockholders on account of bond depreciation; the balance of the said amount was to be applied directly against the bond account of the bank on account of estimated depreciation reducing the then total of bond account by $110,650. It was further resolved that as further payments were received from stockholders on account of the purchase of bond depreciation, that such sums should be applied on the bond account as above specified [S. R. 20].

The intended purpose of the purchase of the bond account was embodied in Plaintiffs' Exhibit 4, which reads in part as follows:

> "It is the intention that interest received from bonds equalling the amount of depreciation purchased be set aside for the use of the undersigned. An appraisal of the bond lease shall be made each six months and should a decrease in the depreciation be shown, the amount shall be divided *pro rata* among the stockholders purchasing depreciation of bond account." [S. R. 80-81-82.]

In compliance with the action of the Board of Directors taken at the meeting on June 18, 1931 [S. R. 80-81-82] recommending that stockholders pay into a fund for the purchase of bond depreciation a sum equal to $175.00 for each share owned [S. R. 80], the shareholders subscribed to such fund in the amount set opposite their names [S. R. 81-82] with the intention that interest received from the bonds equalling the amount of depreciation purchased to be set aside for the use of the subscribers named. An appraisal of the bond account was to be made every six months and should any decrease in the depreciation be shown, the amount of such appreciation to be divided *pro*

rata among the stockholders purchasing the said depreciation [S. R. 81]. The various amounts subscribed by the shareholders were in fact paid in, and no part thereof has ever been repaid to any of the appellants herein [R. 6, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 25, 26, 27, 28, 29, 30, 31, 32]. The sum of $30,000.00 of the money so subscribed was used for the purpose of cancelling the bank's indebtedness to certain directors and stockholders who had under like circumstances subscribed that amount in the year 1930 for the purpose of taking up the depreciation in the bond account at that time [S. R. 20]. The method of making a loan to the bank for the purpose of taking up bond depreciation by purchase thereof was used by the directors at the instigation of R. Foster Lamm, a bank examiner duly appointed by the Comptroller of the Currency [S. R. 94 and 95]. When the said R. Foster Lamm notified the directors of the Bank that the bond account of said Bank was deficient, the directors inquired of him as to what could be done about the matter and he suggested that they follow the same procedure which he had formerly caused the First National Bank of Huntington Beach, California to follow in 1929, namely, that the directors purchase the said depreciation in bond account which had become a bad asset, thus giving them a possibility of return of the money which they put in the surplus account or undivided profit account [S. R. 95]. The question was raised at that time as to whether or not there would be any chance of the directors getting their money back if they contributed to the bank. The said R. Foster Lamm, bank examiner, advised them that if they contributed to the bank under his suggestion that what they would do actually would be to buy the depreciation of the bond account which he had found to be a bad asset [S. R. 94].

In the trial of this case in the District Court of the United States, the said bank examiner, under cross-examination, testified that that was one of the customary methods of repairing impaired capital for anyone interested in the bank, such as stockholders or directors or officers, and that such a method had been used in other banks prior to the occasion when it was suggested for the repair of the capital of this bank [S. R. 99]. When asked whether he had ever had the approval of the Department as to such a plan, he replied that the Department had never disapproved it, nor had he received any comment from the Comptroller's office indicating disapproval, although he had submitted the plan to the Department as an accomplished fact in 1929 [S. R. 100]. In a letter from E. H. Gough, Deputy Comptroller of the Currency, addressed to the Board of Directors, Anaheim First National Bank, Anaheim, California, on July 2, 1930, the directors were informed that restoration of the capital might be provided for *by the purchase for cash of the assets estimated by the examiner as losses* [S. R. 89]. The president of Anaheim First National Bank replied to that letter under date of July 17, 1930, and informed the Comptroller that the subscribing directors and stockholders had *purchased the depreciation in the bond account* [S. R. 91]. The Comptroller never disapproved of this form of repairing the capital. The first notice received by the directors and stockholders of the bank that the Comptroller's office viewed their subscriptions as a purchase with distaste, and felt that the money already paid in should be a voluntary contribution was subsequent, to-wit, August 20, 1931, some time after they had paid in the amounts subscribed by them under what they considered to be a valid agreement to purchase the bond account repayable as hereinabove set forth [S. R. 80-81 and 82].

When R. Foster Lamm, the bank examiner for the bank, was replaced by W. J. Waldron, national bank examiner [S. R. 176] the said W. J. Waldron, also approved the said plan [S. R. 77 and 180].

The appellants Minnie Palmer, formerly known as Minnie Baxter, M. Del Giorgio, Jennie Pomeroy and F. A. Yungbluth were stockholders but not directors of said bank and they at no time attended any of the meetings of said bank [S. R. 121, 126, 121].

On January 15, 1934, the bank was declared insolvent by the Comptroller of the Currency of the United States, and on said date the said Comptroller appointed J. V. Hogan as Receiver of the bank, and ever since said date the receiver has been, and now is, the duly appointed, qualified and acting receiver of the bank [S. R. 146-7] and as such took possession of all the assets of the bank including said bond account, and has ever since been liquidating the same [S. R. 147] without regard for appellant's rights.

After the appointment of the receiver, and on or about the 23rd day of August, 1934, the appellants presented to the receiver their respective claims for the respective sums of money subscribed and paid by them to the bank, plus interest thereon, and on August 23, 1934, M. E. Day presented her claim for the sum of $875.00 paid to the bank by F. K. Day, with interest thereon, all in the manner and form required by the Comptroller of the Currency, but none of said claims, nor any part thereof has been paid [R. 88].

Many of the bonds involved in the bond account of said bank, the depreciation of which was purchased by the stockholders, were sold and an appreciation shown in their value [S. R. 189, 190].

To summarize the facts, it appears that the directors and stockholders of the bank, upon the advice and at the suggestion of the bank's duly qualified and appointed examiner, subscribed certain moneys of their own to the bank with the intent of purchasing a depreciation in the bond account so that the bank might benefit thereby and by so doing paid a subscription at the rate of $175.00 per share, with the intent and purpose that such money was to be repaid to them from the appreciation in the bond account so purchased; that after such subscription had been paid into the bank they were notified by the Comptroller of the Currency that such an agreement should not be made; that certain of the subscribers were not directors, but were merely stockholders; that the bank later went into the hands of a receiver; that the receiver took over said bond account together with bank assets; that the receiver subsequent thereto sold certain of the bonds which showed an appreciation in value; that the receiver has never repaid, nor have any of the subscribers, or any of them, at any time received, any part of the moneys subscribed by them; that no accounting has at any time been made to the subscribers by the receiver for any of the money obtained from the sale of bonds from said bond account, nor of the bonds now remaining in his hands.

Some of the findings of fact in the above cause are contradictory and contain, in the opinion of the appellants, negative pregnants. This is so in matters material to this cause. Findings V and X are respectively as follows:

"V.

That it is not true that in any such agreement, as set forth in said complaint or otherwise, the following persons respectively agreed to pay to said Bank the following, or any other, sums:

L. J. Kelly	$ 4,900.00
F. H. Dolan	32,500.00
Ben Baxter	1,750.00
S. James Tuffree	3,500.00
Ed. Kelly	9,000.00
F. A. Yungbluth	1,700.00
Minnie Palmer (formerly known as Minnie Baxter)	3,850.00
M. Del Giorgio	875.00
Jennie Pomeroy	3,500.00
J. W. Truxaw	1,750.00
J. J. Dwyer	1,750.00
F. K. Day	875.00
Ernest F. Ganahl	1,750.00 and
Frank Baum	5,250.00;

and *it is not true that pursuant to any such agreement said persons, excepting Ernest F. Ganahl and Frank Baum, on or about July 17, 1931, paid to said Bank the sums hereinabove set opposite their respective names and it is not true that pursuant to any such agreement said Ernest F. Ganahl on or about July 17, 1931, executed his promissory note for $1,750.00 to said Bank or that, pursuant to such agreement he made any payments of principal or interest on such a note; and it is not true that pursuant to any such agreement said Frank Baum executed his promissory note dated December 19, 1932, for $5,250.00 to said Bank or that pursuant to such agreement he paid interest on said note, or that, pursuant to such agreement, plaintiffs Frank Baum and Josephine Baum on or about May 9, 1933, executed and delivered to said Bank a certain trust deed on the property described in the fourteenth count of the complaint on file herein;* that it is true that on or about July 17, 1931, the

above named persons, except Ernest F. Ganahl and Frank Baum paid to said Bank the sums of money hereinabove set opposite their respective names, and it is further true that on or about July 7, 1931, said Ernest F. Ganahl executed to said Bank his promissory note for $1,750.00, and it is further true that said Frank Baum executed to said Bank his promissory note dated December 19, 1932, for $5,250.00, and it is also true that subsequently said Frank Baum and Josephine Baum executed and delivered to said Bank a trust deed covering certain property described in the fourteenth count of said complaint, but said payments were made and said notes and trust deed were executed and delivered by said persons as voluntary contributions to said Bank and said Bank was not and is not obligated under any such agreement or otherwise to repay said sums or any part thereof, and said Bank has not repaid the same or any part thereof.

X.

That it is not true that within two years prior to the preparation of the complaint on file herein, or within two years prior to the filing thereof, the persons hereinabove in Finding No. V named loaned respectively to said Bank the sums respectively set after their names in said Finding No. V; and it is not true that said Bank received said respective sums, or any of said sums or any part thereof, for the use and benefit, or use or benefit, respectively of said persons, or any of said persons, whose names are set forth in said Finding No. V; *and it is not true that said Bank promised to repay said sums on demand or otherwise;* and it is true that while said sums have not been repaid to any of said respective persons, although demand has been made therefor, it is also true that said Bank is in no way obligated,

in the matter of said receivership or otherwise, to repay said sums or any part thereof to said persons or to any persons or person whomsoever."

Each of the above findings is, in the nature of a negative pregnant as to the ultimate facts material to the action. For the convenience of this Honorable Court, appellants have placed that which they conceive to be negative pregnants in italics. It is apparent from a reading of these findings that they do not negative the allegations of the plaintiffs' complaint to which they refer, but imply the truth of at least some of the allegations without showing which ones, if any, are untrue, thus impliedly admitting the truth of the allegations.

Summary of Argument and Points of Law.

The resolution passed at the meeting of the Board of Directors on the 29th day of May, 1930 [S. R. 105] recites that a reserve fund be created by subscription of various stockholders to offset the depreciation in the bond account, and that the stockholders so subscribing would be reimbursed from said reserve fund to be built up by appreciation in the bond account or by any other earnings of the bank, thus showing their intent to enter into an agreement with the bank to purchase the depreciation in the bond account, *or to purchase for cash those assets of the bank which the bank examiner condemned as losses.* A copy of this resolution was attached to the letter of the president of the Anaheim First National Bank to the Comptroller of the Currency under date of June 11th, 1930 [S. R. 88]. In his reply to that letter, E. H. Gough, Deputy Comptroller of the Currency under date of July 2nd, 1930, acknowledged receipt of the said resolution [S. R. 88] and definitely informed the

Board of Directors of Anaheim First National Bank that restoration of capital could be restored under Section 5205 by the *purchase for cash of the assets estimated by the examiner as losses* [S. R. 89]. On July 17, 1930, the president of Anaheim First National Bank addressed a letter of reply to Mr. E. H. Gough's letter of July 2nd, 1930 and informed him that the subscribing stockholders had subscribed the sum of $30,000 which amount was placed in a reserve account with the bank for the purpose of covering a partial depreciation in the bond account of said bank *with the understanding that they had purchased the depreciation in the bond account.* To that letter the Comptroller made no reply, thus, at least tacitly, approving the restoration of the impaired capital of the bank by that plan. This creates a conclusive presumption as against the appellee that such a method of repairing impaired capital losses was valid and satisfactory to the Department.

Yazoo State Bank v. Kimbrough, 127 S. 265, 157 Pac. 149.

2. The letter from the Comptroller of the Currency addressed to the directors of the bank subsequent to the time when said subscriptions were made at the instance and suggestion of the National Bank Examiner, R. Foster Lamm [S. R. 41-42] is not binding upon the appellants because it was written, and received, subsequent to the transaction in question, and in the case of the contributing stockholders who were not directors, was not seen by them, nor were they apprized of its contents, and did not by its terms forbid such an agreement but merely stated that such action *should* not be taken [S. R. 42].

The same is true as to the cross-examination by counsel for the bank as to matters and events which had tran-

spired a year prior to the transaction involved in this particular case [S. R. 83-84].

3. The receiver of a national bank succeeds to no rights beyond those which could have been enforced by the bank, its stockholders or creditors, and in the instant case the receiver's failure to account to the subscribing appellants for the appreciation in the value of the bonds purchased by them, and the disposition of the remaining bonds by the receiver in the instant case, was and is unlawful.

Way v. Camden Savings Deposit and Trust Co., 21 Fed. Supp. 700;

Brown v. Schleier, 112 Fed. 577, aff'd 118 Fed. 981, 55 C. C. A. 475, which is aff'd 24 S. Ct. 558, 194 U. S. 18, 48 L. Ed. 857.

4. By reason of the appointment of the receiver and liquidation of the bond account purchased by the directors and stockholders prior to said appointment, there was a failure of consideration for the amounts of money subscribed respectively by the appellants to said bank.

Code 1930, Secs. 22-1802;

Skinner etc. v. Rich et al., 55 Pac. (2d) 1146.

5. The respective claims of the appellants presented to the receiver were valid and subsisting claims against the bank.

Eisele v. First National Bank, 137 Atl. 827, 101 N. J. Equity 61, affirmed (Error and Appeal 1928), 142 Atl. 29, 102 N. J. Equity 598.

6. If the method used to restore the impaired capital of the bank was unlawful under Section 5205, or any other statute pertaining to national banks then, the agreement being unlawful was void in its inception, and each and all of the subscribing stockholders have the right under the law to a refund of each and every amount paid into the bank for restoration of the impaired capital.

Wood v. Imperial Irr. Dist., 216 Cal. 748;

Silverthorn v. Percy, 120 Cal. App. 83;

Butterfield Constr. Co. v. Federal etc., 5 Cal. App. (2d) 16;

Teachout v. Bogey, 175 Cal. 481;

Moffatt v. Boulson, 96 Cal. 106.

7. Findings of Fact V and X are contradictory and are in form in the nature of negative pregnants as to ultimate facts material to the cause of action. A finding in the form of a negative pregnant attempting to negative an affirmative allegation implies the truth of the allegation.

Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 200 Pac. 814;

Wiles v. Hammer, 66 Cal. App. 538, at page 540;

Auerbach v. Healy, 174 Cal. 60-65, 161 Pac. 1157;

South. Pac. R. R. v. Dufour, 95 Cal. 615, 619, 19 L. R. A. 92, 30 Pac. 783.

Since one part of the contradictory findings would support the judgment and another part would necessarily upset it, then the judgment cannot stand.

Learned v. Castle, 78 Cal. 450, 460, 21 Pac. 11, 13.

ARGUMENT.

Preliminary Observations.

The pleadings, shorn of all by-play and irrelevant verbiage in the answer of the appellee, admits all of the allegations of the complaint and raises but one issue [R. 50-74]. Appellants base their respective claims against the bank upon the agreement with the bank as embodied in Plaintiffs' Exhibits I and IV [S. R. 16, 17, 80, 81 and 82]. The appellee by its answer admits the payment of the respective amounts by the respective appellants, and the fact that those amounts were never repaid in any manner or at all to the appellants, or any of them, but denies the validity of the agreement of the bank with the appellants [R. 50-74]. The appellee bases its whole case on the letter written by the Comptroller of the Currency to the Board of Directors of the bank subsequent to the transaction which constitutes the cause of action here [S. R. 41 and 42], and other letters to like effect that contributions as made in this case to restore capital *should* be made unconditionally and without the expectation of reimbursement, and a letter from the Comptroller of the Currency under date of July 2, 1930, in regard to an entirely different transaction which had no bearing upon the issues in this case. No attack is made on the agreement of June 18, 1931 [S. R. 16] except the validity thereof, based upon the letters of the Comptroller of the Currency already referred to. The evidence, without contradiction or conflict, shows the contributions of the moneys by the appellants [S. R. 80], the intent to make such subscriptions with the intent of being reimbursed, [S. R. 80], to be repaid in pro rata shares should a decrease in the depreciation be shown [S. R. 80]. The evidence further shows without contradiction that Minnie Palmer, formerly known as Minnie Baxter,

M. Del Giorgio, Jennie Pomeroy and F. A. Yungbluth, appellants, were stockholders and not directors of the bank and that they at no time attended any of the meetings of the bank [S. R. 126-121-122-124-125].

In connection with the letter from the Comptroller of the Currency of August 20, 1931 [S. R. 41-42], it is to be noted that no place in that letter does the Comptroller state definitely that such contributions *cannot* be made as loans to the bank, but instead he uses this language. We quote:

> "* * * this office wishes to bring to your attention again at this time the fact the contributions made to restore capital *should* be made unconditionally and without the expectation of reimbursement. * * *" (Italics ours.)

It is further to be noted that the Comptroller of the Currency had advised the president of the bank on July 2, 1930, in regard to an entirely different transaction, but one involving exactly the same circumstances, that *bad assets viewed as losses by the examiner could be purchased by stockholders for cash* [S. R. 82-90] *and he at no time voiced disapproval of the refund to the contributing stockholders in that transaction of the sum of $30,000.* It was not until the bank was declared insolvent and the receiver appointed in 1934, three years later, that the directors and stockholders received their first definite notice that the Comptroller of the Currency would not recognize their agreement with the bank as valid. Certain it is that no fact or circumstance as presented in this action even remotely raises an issue with respect to the existence of the agreement. The only issue taken is as to the validity and enforcement of the agreement.

It is further to be noted, as was brought out by counsel for the appellee in the trial of this matter, that *if the impairment of the bank capital had not been met in a manner satisfactory to the Comptroller of the Currency, that the Comptroller could have closed the bank and put a receiver in charge to liquidate the same* [S. R. 115]. *In fact, that was the Comptroller's duty. This, however, was not done until nearly four years later when Mr. Hogan was appointed as receiver* [S. R. 147].

I.

The Directors or Stockholders of a Bank Can Make a Valid Contract With It in Absence of Fraud, Bad Faith or Undue Advantage.

The subscriptions to the bank on the part of the appellants were not voluntary contributions. They were made to purchase the depreciation in the bond account at the instance and request of the bank examiner, R. Foster Lamm, who was a duly appointed and qualified representative of the Comptroller of the Currency [S. R. 94-95]. Indeed, they were made after the said R. Foster Lamm had informed the directors of the bank, who had questioned the said R. Foster Lamm as to that method that that same procedure had been followed by the First National Bank of Huntington Beach, California, in 1929 [S. R. 99]. The subscriptions were made solely for the benefit of the bank, and pursuant to the instructions and information given to them direct from the Department in the letter from E. H. Gough, Deputy Comptroller of the Currency, under date of July 2nd, 1930, that they might purchase for cash assets estimated by the examiner as losses. This is exactly what they did. The consideration for the subscriptions made was the depreciation in

the bond account. In other words, they purchased for cash the depreciation in the bond account which the bank examiner had condemned as bad assets.

There was no fraud, no bad faith, or undue advantage practised by the directors in causing such subscriptions to be made to the bank. There could be no wrong on the part of the directors and stockholders in purchasing the depreciation in said bond account.

In the case of *Everett v. Staton,* 134 S. E. 492, 192 N. C. 216, the Court used the following language:

> "Directors of bank can make valid contract with it, in absence of fraud, bad faith or undue advantage."

In the case of *Andrews v. Citizens State Bank of Goldfield,* 221 N. W. 954, 207 Iowa 386, the Court found as follows:

> "Officers of insolvent bank, who made loan to bank, may be termed depositors to extent which loan consisted of deposits."

Again, in the case of *Eisele v. First National Bank,* 137 Atl. 827, 101 N. J. Equity 61, affirmed (Error and Appeal, 1928) 142 Atl. 29, 102 N. J. Equity 598, it was held as follows:

> "Directors advancing money to bank to meet deficit caused by depositor's overdraft may recover such money on settlement."

It has been held in the State of California that such agreements were valid agreements and that contributions so made are not voluntary contributions. It was so found in the case of *Dudley v. Citizens State Bank of Santa Monica,* 103 Cal. App. 433.

To the same effect is an early district of Ohio case, *Booth v. Welles,* 42 Fed. (2d) 11. In this case the particular portion which we refer to is on page 14.

Along this same line we cite the case of *In re Hulitt,* 96 Fed. 785, wherein we find the following:

> "Where the number of shareholders of a national bank in good faith paid an assessment made to comply with the requirements of the Comptroller to make good an impairment of the bank's capital, although such an assessment was invalid, because made by the directors instead of by the stockholders, on the insolvency of the bank, and after the winding up of its affairs by a receiver, after outside creditors are paid, such paying shareholders are entitled to be treated as creditors as against the nonpaying shareholders, and repaid the amount so paid, before general distribution of remaining assets among all the shareholders."

In the case of *Wyman v. Bowman,* 127 Fed. 257, the Court said:

> "Contracts between directors of a corporation and the corporation, which are fair and made in good faith which do not secure an unjust benefit, and in which the interest of the individuals and the duty of the officers *work together for the welfare of the corporation are valid.*" (Italics ours.)

To the same effect are the following cases:

Rhea v. Newton, 262 Fed. 345, certiorari denied (1920);

Newton v. Rhea, 41 S. C. 14, 254 U. S. 643, 65 L. Ed. 454;

McLean v. Bradley, 299 Fed. 379, affirming judgment (D. C., 1932) 282 Fed. 1011, certiorari denied S. C. 98, 266 U. S. 619, 69 L. Ed. 471;

In re Lake Chelan Land Company, 257 Fed. 497, 5 A. L. R. 577.

In the case of *Yazoo State Bank v. Kimbrough,* 127 So. 149, the Court said:

> "Cashiers and directors putting up cash in place of notes, examiner rejected, held entitled to proceeds of notes when collected."

The language just quoted is an exact statement of what appellants contend the law to be. In the instant case we have a bond depreciation which was purchased by the directors and other stockholders for the benefit of the bank, under an agreement that an appraisal be made of such bond account every six months and that any appreciation shown in said bond account would be distributed among the contributing directors and shareholders in pro rata shares. In other words, the directors and shareholders purchased the depreciation in the bond account which the bank examiner rejected and any appreciation in that bond account should have been distributed to the appellants, who purchased the same.

II.

Letter From the Comptroller of the Currency Addressed to the Directors of the Bank Subsequent to the Time When Said Contributions Were Made at the Instance and Suggestion of the Bank Examiner, R. Foster Lamm, Is Not Binding Upon the Appellants Because it Was Written and Received Subsequent to the Transaction in Question, and in the Case of the Contributing Stockholders Who Were Not Directors Was Not Seen by Them Nor Were They Apprized of Its Contents. The Same Is True of Any Letters Addressed to the President of the Bank Prior to the Date of This Transaction Referring to a Totally Different Transaction.

The subscriptions to the bank were made in compliance with the meeting of June 18, 1931 [S. R. 16-17], and in a letter dated August 20th, two months afterwards, the Comptroller of the Currency notified the board of directors of the bank, in part, as follows:

> "A capital impairment of $94,400.53 was shown by national bank examiner W. J. Waldron in this report of an examination of your bank completed June 24, which it is understood has been provided for by voluntary and unconditional contributions of directors and shareholders. The contributions up until July 17, 1931, are reported to have amounted to $115,650, of which $73,775 was cash and $41,875 in the form of fourteen ninety-day notes. There were still eighteen stockholders to interview and obtain contributions from."

Then the fourth paragraph of the same letter:

> "Although you have been previously advised in this regard this office wishes to bring to your attention again at this time the fact that contributions made to restore capital *should* be made unconditionally and without the expectation of reimbursement. Please advise in your reply to this letter that you have the correct understanding in this regard." [R. 112-113.] (Italics ours.)

No place in that letter did the Comptroller of the Currency say that such contributions *must* be considered as voluntary, but merely that they *should* be. As will be readily noticed, this letter was written subsequent to the date of the transaction in question, and therefore could not be binding upon the parties.

The only time prior to the transaction with which we are dealing here when the Comptroller of the Currency made any comment as to the handling of such situations was prior to the time when his bank examiner, R. Foster Lamm, advised the procedure adopted in this case, to-wit, in an entirely different transaction, which took place on the 29th day of May, 1930, one year prior to this transaction. The same law therefore applies. It is also to be noticed that at no time has the repayment of that former loan been criticized.

III.

The Evidence in the Trial of the Case Showed That There Had Been an Appreciation in the Value of Bonds Taken Over by the Receiver of the Bank, and the Receiver of a National Bank Succeeds to No Rights Beyond Those Which Could Have Been Enforced by the Bank, Its Stockholders or Creditors.

The written instrument "Disposition of Bonds" [S. R. 127-128, 189-190] shows on its face an appreciation in the bond account of $655.62, obtained by the receiver for the bonds which were sold. These bonds were among those listed in the depreciation which the appellants purchased. Since the best evidence is the written instrument, we can see no reason to argue this point.

The receiver's failure to account to the subscribing appellants for the appreciation in the value of the bonds purchased by them, and the disposition of the remaining bonds (the appreciation in which was proven) was and is unlawful.

Way v. Camden Savings Deposit and Trust Co., 21 Fed. Sup. 700;

Brown v. Schleier, 112 Fed. 577, affirmed 118 Fed. 981, 55 C. C. A. 475, which is affirmed 24 S. C. 558, 194 U. S. 18, 48 L. Ed. 857.

IV.

By Reason of the Liquidation of the Bond Account, the Depreciation in Which Was Purchased by the Appellants, There Is a Failure of Consideration for the Respective Amounts Subscribed by the Respective Appellants.

After the appointment of the receiver of the appellee bank and the liquidation of the bond account, the appellants were deprived of their only possible chance to recover the amount of their respective subscriptions under the agreement entered into in compliance with the action of the board of directors taken at a meeting held June 18, 1931, as set forth in Plaintiffs' Exhibit No. 4 [S. R. 80, 81 and 82].

Code 1930, Sec. 22-1802.

Skinner etc. v. Rich et al., 55 Pac. (2d) 1146.

There is no way at this late date, in fact there is no way at all, of telling whether or not the bonds were liquidated at the best price which the market would bring, but we do know that by their liquidation the appellants were deprived of the sole consideration for which they paid their money.

V.

The Respective Claims of the Appellants Presented to the Receiver Were Valid and Subsisting Claims Against the Bank.

The agreement entered into between the bank and the appellants in compliance with the meeting of June 18, 1931, was recognized as a valid agreement from that time until the receiver was appointed, three years later. There is no contention but that the respective claims of the appellants herein were duly presented to the receiver in the manner and form as required by the Comptroller of the Currency on or about August 23, 1934 [R. 18, 19, 20, 21, 24]. That there can be such a valid and subsisting claim as the one in this point need scarcely be argued, but we do quote the following case on this point:

> *Eisele v. First National Bank,* 137 Atl. 827, 101 N. J. Equity 61, affirmed (Err. & App., 1928) 142 Atl. 29, 102 N. J. Equity 598.

VI.

If the Agreement Entered Into Between the Appellants and the Bank in Compliance With the Meeting of June 18, 1931, Was in Fact Unlawful, Then It Was Void in Its Inception and the Subscribing Stockholders Have the Right Under the Law to a Refund of the Respective Amounts, Paid by Them Under That Contract.

Under no theory could the appellee retain the amount of the subscriptions of the appellants herein under an unlawful contract made in contravention of statute. If, as the appellee contends, such a contract was forbidden by the National Banking Laws and was in fact *ultra vires,* then there was no mutuality of consent, no consideration and the contract was void from the beginning.

McKinney's Digest, "Contracts," Sec. 14;
6 *Cal. Jur.* 44;
6 *R. C. L.* 686;
26 *A. L. R.* 473 (Notes).

The contract not being *malum in se* but merely *malum prohibitum,* and entered into through mistake in law and fact, gives the appellants the right to refund of the respective moneys subscribed by them.

McKinney's Digest, "Contracts," Sec. 32;
4 *Cal. Jur.* 784;
6 *Cal. Jur.* 78;
6 *R. C. L.* 620;
6 *R. C. L.* 629.

VII.

Findings of Fact Which Are Contradictory and in the Nature of Negative Pregnants in Form as to Ultimate Facts Material to the Cause of Action Imply the Truth of the Allegation, and Since One Part of the Contradictory Findings Would Support the Judgment and Another Part Would Upset It, Then the Judgment Cannot Stand.

Findings of Fact V and X are contradictory and are in form in the nature of negative pregnants as to ultimate facts material to the cause of action. A finding in the form of a negative pregnant attempting to negative an affirmative allegation implies the truth of the allegation.

Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 200 Pac. 814;

Wiles v. Hammer, 66 Cal. App. 538, at page 540;

Auerbach v. Healy, 174 Cal. 60-65, 161 Pac. 1157;

Southern Pac. R. R. v. Dufour, 95 Cal. 615, 619, 19 L. R. A. 92, 30 Pac. 783.

Since one part of the contradictory findings would support the judgment and another part would necessarily upset it, then the judgment cannot stand.

Learned v. Castle, 78 Cal. 450, 460, 21 Pac. 11, 13.

VIII.

The Equities in This Proceeding Are With the Appellants.

Without repeating what we have said in the foregoing argument, we respectfully submit to the Court that the facts and circumstances show that it was the desire and intent and purpose of the appellants to aid the bank which was in distress due to an impairment of capital caused by depreciation in the bond account, *but* that the appellants subscribed to the fund for the purchase of said depreciation only as a loan to the bank, such moneys to be repayable to them by the bank, if and when the said bond account appreciated in value. This they did under what they considered to be a valid agreement with the bank, signed by the proper officers on behalf of the bank. They had the word of the bank examiner, who had been appointed by the Comptroller of the Currency, that this could and had been done on a prior occasion, as well as the word of the Department itself as contained in the letter of July 2, 1930 [S. R. 89]. They were further justified in their belief by reason of the fact that part of the money which they were subscribing in this transaction was to be used for the repayment of a prior subscription made under identically the same circumstances [S. R. 20], which was later done, and never disapproved by the Comptroller.

It was not until subsequent to the time when they had already put up their money that the directors were notified by the Comptroller that this method *should* not be

used. Even then they were not definitely advised that such a method *must* not be used [S. R. 42]. Further, they were at no time advised by the Comptroller's office that the repayment of the amounts refunded to the stockholders and directors who subscribed on the prior occasion, was unlawful.

In the cases of the appellants, Minnie Palmer, formerly known as Minnie Baxter, M. Del Giorgio, Jennie Pomeroy and F. A. Yungbluth, they were stockholders and not directors of the said bank, and at no time attended any of the meetings of said bank. They were never advised, nor in any way apprised, of the fact that the Comptroller's office at any time, or at all, whether prior or subsequent to the transaction in question, objected to their subscriptions being made in the form of a loan.

The agreement between the bank and the appellants was recognized as a valid agreement from the 18th day of June, 1931, until the bank was declared insolvent and the receiver appointed three years later. The latter took over the bonds in said bond account and refused to acknowledge the respective claims of the appellants herein, which were duly presented to him all in the manner and form as required by the Comptroller of the Currency on or about August 23, 1934 [R. 18, 19, 20, 21, 24], more than three years after the contributions were made.

It is the position of the appellee that, because some of the appellants were notified subsequent to the transaction that the transaction *should* not have been made, that no

equities arise in behalf of the appellants. Every principal of equity decries such a position.

Arguing this case as a case in equity, rather than a case at law, an agreement was entered into between the bank and its directors and certain stockholders thereof. The appellee contends that this agreement was unlawful. If it was unlawful then it was void from its inception.

Civil Code of California, Secs. 1667, 709-16;
6 *R. C. L.* 692-694-696;
58 *A. L. R.* 804.

But this was not a contract *malum in se,* but merely *malum prohibitum,* entered into through mistake in law and fact.

McKinney's Digest, "Contracts," Sec. 32;
4 *Cal. Jur.* 784;
6 *Cal. Jur.* 78;
6 *R. C. L.* 620;
6 *R. C. L.* 629.

Under no theory could it become a contract as viewed by the appellee since, if the appellee is correct in its view at this time, then there was no mutuality of consent.

McKinney's Digest, "Contracts," Sec. 14;
6 *Cal. Jur.* 44;
6 *R. C. L.* 686;
26 *A. L. R.* 473 (Notes).

As soon as their mistake was discovered by the appellants they brought action. They did not sleep on their

rights. The position of the appellee is untenable. Equity has never permitted advantage to be taken of a mistake whether in law or in fact, nor has equity ever permitted unjust enrichment of one party to a contract at the expense of the other.

We have presented what we conceive to be the only issues involved in this action. Nothing in the record, or the supplemental record, discloses any other issue. The fact that the Comptroller of the Currency notified the president of the bank (who is not an appellant) that a prior transaction was not in accordance with his views has naught to do with the transaction in controversy, nor does such a fact open the door to surmise and conjecture. Nor does anything which has transpired since the date of the transaction change the rights of the respective appellants.

We believe that we have demonstrated that the agreement entered into between the appellants and the bank was a valid agreement and that the appellants did in fact purchase the depreciation in the bond account; that the receiver stood merely in the shoes of the bank and succeeded to no greater rights than had the bank. Hence, the appellants were entitled to an accounting from the receiver as to the proceeds of the bond account and are entitled to the proceeds now in the hands of the receiver from the disposition of said bond account.

In no event can the judgment of the District Court stand since negative pregnants in Findings of Fact V and X are contradictory and where one part of such find-

ing would support the judgment and another part would necessarily upset it, the judgment is not valid.

Should this Honorable Court find this case one in equity rather than a case at law, then the appellants are entitled to a refund of the respective amounts contributed by them under the agreement which the appellee now contends was unlawful since said agreement would then be void in its inception, and not being *malum in se* but merely *malum prohibitum,* the appellants are entitled to a refund of their money.

We respectfully ask that the decree of the District Court be reversed.

Respectfully submitted,

Edw. C. Purpus,

Attorney for Appellants.